PRIDE MOULD (M) SDN BHD

v.

JEMCO SDN BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
[CIVIL APPEAL NO: W-03-102-1996]
9 MAY 2001

CIVIL PROCEDURE: *Striking out - Grounds for - Whether frivolous, vexatious and an abuse of process of court - Whether res judicata applicable - Whether triable issues - Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)*

This was the third suit filed by the appellant against the respondent. In the first suit, the appellant filed for breach of contract which resulted in a consent order. The second suit was filed for an alleged breach of contract and breach of the said consent order and the appellant sought for specific performance or alternatively for damages. However, that was struck out by the court upon the respondent's application. Then, the appellant filed this third suit for an alleged breach of contract and breach of the said consent order but this time prayed for loss of profit and damages. The registrar struck out this third suit under O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980 ('RHC'). The appellant's appeal to the judge in chambers was also dismissed. Hence, the present appeal.

Held:
Per Mohd Saari Yusoff JCA

[1] The court agreed with the appellant that as the present appeal was against an interlocutory order, the principle of *res judicata* had no application. However, on the facts and circumstances of the case, there was no triable issue. Further, the present case was frivolous, vexatious and an abuse of the process of the court by virtue of O. 18 r. 19(1)(b) and (d) RHC.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah tindakan kali ketiga yang difailkan oleh perayu terhadap penentang. Dalam tindakan yang pertama, perayu memfailkan untuk kemungkiran kontrak dan itu telah membawa kepada suatu penghakiman persetujuan. Tindakan kedua difailkan untuk kemungkiran kontrak dan kemungkiran penghakiman persetujuan dan perayu memohon untuk pelaksanaan spesifik atau gantirugi

secara alternatif. Tetapi tindakan itu dibatalkan oleh mahkamah diatas permohonan pihak penentang. Kemudiannya, perayu memfailkan tindakan ketiga ini untuk kemungkiran kontrak dan kemungkiran penghakiman persetujuan tetapi kali ini perayu memohon untuk kehilangan keuntungan dan gantirugi. Pendaftar membatalkan tindakan ketiga ini di bawah A. 18 k. 19(1)(b) dan (d) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Rayuan perayu kepada hakim dalam kamar juga ditolak. Maka, rayuan ini.

Diputuskan:
Oleh Mohd Saari Yusoff HMR

[1] Mahkamah bersetuju dengan perayu bahawa oleh kerana rayuan ini adalah berkaitan dengan perintah interlokutori, maka prinsip *res judicata* tidak boleh dipohon. Walaubagaimanapun, berdasarkan kepada fakta dan keadaan kes ini, tidak ada isu yang berbangkit. Tambahan pula, kes ini adalah remeh, melampau serta menyalahgunakan proses mahkamah berdasarkan kepada A. 18 k. 19(1)(b) dan (d) KMT.

[Rayuan ditolak dengan kos.]

Case(s) referred to:
Cheng Hang Guan v. Perumahan Farlim (Penang) Sdn Bhd [1988] 2 CLJ 35 ***(refd)***
Peninsula Land Development Sdn Bhd v. K Ahmad [1970] 1 MLJ 253 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)

For the appellant - RR Mahendran; M/s RR Mahendran & Co
For the respondent - Azhar Arman Ali; M/s Yahya Helmy & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S1-22-486-1994]

Reported by Usha Thiagarajah

JUDGMENT

Mohd Saari Yusoff JCA:

In the High Court, the respondent/defendant applied to strike out the action filed by the appellant/plaintiff under O. 18 r. 19(1)(b) and (d) of RHC 1980. The learned registrar granted the application and in consequence thereof the appellant appealed to the judge in chambers. The learned judge dismissed the appeal, hence the present appeal to this court.

Events Leading To The Dispute

Under an agreement dated 15 April 1992 entered into between the appellant and the respondent, the appellant agreed *inter alia* to manufacture and deliver to the respondent 13,000 units GRP telephone booths (hereinafter referred to as "the goods") for a total sum of Malaysian Ringgit seven million one hundred and forty thousand (RM7,140,000) (hereinafter referred to as "the agreement"). Out of 13,000 units, the appellant undertook to produce 300 units of the goods in the first month, 900 units in the second month and 1,000 units monthly thereafter in accordance with the expected order schedule of the Telekom.

In a later development, the appellant filed an action against the respondent for alleged breach of contract *vide* Civil Suit No: D3-22-1443-1992, which resulted in entering of a consent order on 13 November 1992. The terms of the consent order are as follows:

1. Pihak-pihak akan meneruskan dengan perjanjian bertarikh 15hb April 1992 tetapi jadual hantarserahan adalah seperti berikut:

   a) 1,100 unit pondok-pondok talipon GRP pada atau sebelum 31hb Disember 1992 dan kemudiannya;

   b) 1,000 unit pondok-pondok talipon GRP pada atau sebelum tarikh akhir setiap bulan yang kemudian hingga 31hb Januari 1994.

2. Defendan akan bekalkan Plaintif dengan satu Surat Kredit dengan sertamerta berkaitan dengan 1,100 unit pondok-pondok talipon GRP tersebut. Surat kredit tersebut harus membenarkan hantarserahan sebahagian dan mentunaikan sebahagian berkenaan. Surat-surat Kredit untuk bulan-bulan kemudian akan dibekalkan pada atau sebelum 1hb setiap bulan.

3. Kesemua lain terma-terma perjanjian bertarikh 15hb April 1992 akan terus beroperasi.

4. Defendan akan membayar Plaintif $11,765.89 pada atau sebelum 17hb November 1992 seperti dinyatakan dalam surat peguamcara Defendan bertarikh 12hb November 1992 dan amaun-amaun selanjutnya yang dinyatakan di sana berkenaan dengan cagaran elektrik, bil elektrik, talipon dan air sekiranya Plaintif boleh menunjukkan bahawa bil-bil servis tersebut (dan cagaran) telah pun dibayar dan dijelaskan.

DAN SELANJUTNYA ADALAH DIPERINTAHKAN bahawa kandungan 4 ditarik balik dengan tiada perintah dan setiap pihak menanggung kosnya sendiri berkenaan dengan kandungan Mahkamah (4) dan tindakan ini juga ditarik balik dengan kebebasan kepada Plaintif untuk memfail semula.

Subsequently, on 11 November 1993 the appellant filed an action against the respondent for alleged breach of contract and the consent order *vide* Civil Suit No. D2-22-1137-1993. In the aforesaid suit, the appellant sought relief for specific performance, alternatively for damages. On application by the respondent for striking out of the suit, Siti Norma J (as she then was) granted the application to which there was no appeal.

Then, on 30 September 1994 the appellant filed the present action for alleged breach of contract and consent order and prayed for loss of profit and damages.

Finding

It is not in dispute that pursuant to the consent order dated 13 November 1992, the respondent had given the appellant letters of credits in connection with the manufacturing of 1,100 units of the goods. Looking at para. 19(i) of the statement of claim, it is not in dispute that the appellant had failed to manufacture and deliver to the respondent 1,100 units of the goods on or before 31 December 1992 as required under the terms of the consent order. The appellant was only able to deliver 481 units out of 1,100 units.

The main complaint of the appellant was that the respondent had entered into a contract with a third party (Tetuan Aya Fuji Fibreglass Industries Sdn Bhd) for the purchase of the goods and further the respondent had stopped its agent or servant from inspecting and issuing certificates in respect of the goods manufactured by the appellant.

With regard to the contract with the third party, counsel for the respondent argued that such a contract was independent of the contract with the appellant. So long as the respondent honoured the contract with the appellant, there was nothing to prevent the respondent from obtaining the goods from a third party to enable the respondent to meet its obligation under a contract with Telekom for the supply of the goods.

In the court below, in his judgment Mohd Noor J (as he then was) held *inter alia* the following:

> (1) kausa tindakan adalah sama, iaitu keingkaran kontrak, walaupun prayers-prayers adalah berlainan.
>
> (2) isu-isu yang dibawa oleh Plaintif dalam Tindakan Ketiga termasuk frod timbul sebelum Tindakan Kedua difailkan, yang sepatutnya dimasuk dan dibicarakan dalam Tindakan Kedua itu.

We agree with counsel for the appellant that as the present appeal is against an interlocutory order, the principle of *res judicata* has no application (see *Peninsula Land Development Sdn Bhd v. K Ahmad* [1970] 1 MLJ 253; *Cheng*

Hang Guan v. Perumahan Farlim (Penang) Sdn Bhd [1988] 3 MLJ 90). All the same, on the facts and circumstances of the present case, we are of the view that there is no triable issue. Further, we are of the view that the present case is frivolous, vexatious and an abuse of the process of the court as envisaged under O. 18 r. 19(1)(b) and (d) of RHC 1980. In the premise, we dismissed the appeal with cost.